LIBRARY
SUPREME COURT. U. S.

Office - Supreme Court, U.S.
FILED
JUN 2 1958
JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. [redacted] 65

GEO. F. ALGER COMPANY,
Appellant,
vs.
STANLEY J. BOWERS, Tax Commissioner of Ohio,
Appellee

ON APPEAL FROM THE SUPREME COURT OF OHIO

BRIEF OPPOSING MOTION TO DISMISS

EDMUND M. BRADY,
JOHN M. VEALE,
2150 Guardian Building,
Detroit 26, Michigan.

TAYLOR C. BURNESON,
3510 Le Veque-Lincoln Tower,
Columbus 15, Ohio.
PAUL D. MILLER,
MILTON BLACK,
20 Broad Street,
New York 5, New York.

Of Counsel:
MATHESON, DIXON & BRADY,
2150 Guardian Building,
Detroit 26, Michigan.

MUDGE, STERN, BALDWIN & TODD,
20 Broad Street,
New York 5, New York.

Interstate Brief & Record Co., 642 Beaubien St., Detroit 26, Michigan

SUBJECT INDEX

	Page
Jurisdiction	2
Questions Presented	2-4
Argument:	
I. The Question as to Constitutional Invalidity of the Ohio Axle-Mile Tax Law as Applied to Exclusively Interstate Motor Carriers is Substantial	4-12
II. The Qaestion as to Constitutional Invalidity of the Ohio Axle-Mile Tax Law With Respect to Assessments Thereunder Levied Pursuant to the Arbitrary and Inflexible "No-Reciprocity" Policy Applied by Appellee and Other State Officials is Substantial	13-21
Conclusion	22

INDEX OF AUTHORITIES CITED

Cases:

Aero Mayflower Transit Co. v. Board of Railroad Commissioners, 332 U. S. 495 (1947)	9
Anniston Mfg. Co. v. Davis, 301 U. S. 337 (1937)	19
Anti-Fascist Committee v. McGrath, 341 U. S. 123 (1950)	17, 19
Buck v. Kuykendall, 267 U. S. 307 (1925)	10
Capitol Greyhound Lines v. Brice, 339 U. S. 542 (1950)	4, 6, 7, 8, 21
Dixie-Ohio Express Company v. Commissioner, 306 U. S. 72 (1939)	9
Embree v. Kansas City Road District, 240 U. S. 242 (1916)	19

Page

Garfield v. United States, 211 U. S. 249 (1908).... 19
Geo. F. Alger Co. v. Bowers, 166 Ohio State 427, 143 N. E. (2) 835, 836.....5, 15, 16
Hendrick v. Maryland, 235 U. S. 610 (1915)..... 10
Interstate Motor Freight System v. Bowers, 164 Ohio State 122, 128 N. E. (2) 97 (1955)..... 19-20
Kane v. New Jersey, 242 U. S. 160 (1916)..... 15
Nashville, Chattanooga & St. Louis Railway v. Walters, 294 U. S. 405 (1935)..... 11
Noerr Motor Freight, Inc. v. Eastern Railroad Presidents Conference, 155 F. Supp. 768 (E. D. Pa. 1957) 6
Raley v. Ohio, 354 U. S. 929 (1957)..... 16
Rindge Company v. Los Angeles, 262 U. S. 700 (1923) 19
Southern Pacific Railway v. Arizona, 325 U. S. 761 (1945) 7
Southern Railway Co. v. Virginia, 290 U. S. 190 (1933) 18
State ex rel. Interstate Motor Freight System v. O'Neill, 167 Ohio State 139, 146 N. E. 720 (1957) 16
Sweezey v. New Hampshire, 354 U. S. 234 (1957) 16
Uphaus v. Wyman, 355 U. S. 16 (1957)..... 16
U. S. ex rel. Turner v. Fisher, 222 U. S. 204 (1911) 19
Yick Wo v. Hopkins, 118 U. S. 356 (1886)..... 17

Statutes:

Ohio Axle-Mile Tax Law, Rev. Code of Ohio, Secs. 5728.01-5728.15, 5728.99 .....3, 13, 15, 20
United States Code:
Title 23, Sec. 23(a), 62, 151 et seq..... 9

Congressional Reports: Page

Staff Report to the Committee on Interstate and Foreign Commerce, "State Taxation of Interstate Trucking and the Reciprocity Problem", House Doc. 449, 84 Congress 2nd Sess., July 16, 1956 ..... 14, 21

Law Review Commentary:

Note, The Ohio Axle-Mile Tax, 23 U. of Cinn. Law Rev. 442 (1954)..... 21

IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. 995

GEO. F. ALGER COMPANY,
Appellant,
vs.
STANLEY J. BOWERS, Tax Commissioner of Ohio,
Appellee

ON APPEAL FROM THE SUPREME COURT OF OHIO

BRIEF OPPOSING MOTION TO DISMISS

Appellant, Geo. F. Alger Company (hereinafter sometimes called "Alger"), pursuant to this Court's Rule 16(3), files this Brief Opposing the Motion to Dismiss made by Appellee, Tax Commissioner of the State of Ohio.

JURISDICTION

The Jurisdictional Statement* herein, dated May 12, 1958, clearly and incontrovertibly sets forth, and no challenge whatever is made by Appellee with respect to, the following jurisdictional bases of this appeal, namely:

(a) That the appeal is taken in conformity to statute and the Rules of this Court (J. S. 2-3, 6-8);

(b) That both federal constitutional questions presented on this appeal were timely and properly raised in the courts below (J. S. 4-8); and

(c) That both said federal constitutional questions were passed on by the Supreme Court of the State of Ohio and that its judgment did not rest on an adequate non-federal basis (J. S. 3, 7-8).

This Brief is accordingly addressed to the sole issue raised by the Motion to Dismiss, namely, the substantiality of the federal constitutional questions presented.

QUESTIONS PRESENTED

Since the Motion to Dismiss has not stated the constitutional questions completely, we restate them here in the light of the circumstances of the case:

---

*Throughout this Brief references to pages of the Jurisdictional Statement will be cited as "J. S. —"; references to pages of the printed record before the Supreme Court of Ohio in the present case will be cited as "R. —"; references to pages of the transcript of testimony in Board of Tax Appeals cases Nos. 27151 and 27152, which is Exhibit 1 in Board of Tax Appeals Case No. 30565, will be cited as "Tr. —"; and references to Exhibits 2 through 17 and A through K in Board of Tax Appeals Case No. 30565, and Exhibits 101 through 109 in Board of Tax Appeals Case No. 32604, will be by number as "Ex. —."

This appeal involves the constitutionality of the Ohio Axle-Mile Tax Law as amended, Rev. Code of Ohio, Secs. 5728.01-.15 inclusive and Sec. 5728.99 (J. S. Appendix B, 46a-62a), as applied to a common motor carrier operating exclusively in interstate commerce (R. 77, 84; Tr. 11, 418-20) in Illinois, Indiana, Kentucky, Michigan and Ohio, under authority of the Interstate Commerce Commission (R. 77, 84), utilizing Federal-Aid Highways in Ohio almost 100% (Tr. 40, 364; R. 77, 84). Alger so operates in Ohio vehicles having three or more axles, registered in and with respect to which a tax is paid to other states, including Michigan and Indiana (Tr. 418-19; R. 4), which levy highway use taxes in addition to motor vehicle registration fees, but with which states no reciprocal exemption agreements have been entered into by Ohio as authorized by Section 5728.15 of the Ohio Axle-Mile Tax Law (R. 59-60; Tr. 303, 422) as the result of an arbitrary and inflexible "no-reciprocity" policy (J. S. 10-12; *infra* pp. 13-14) adopted by Appellee and other state officials *to make no reciprocal exemption agreements whatever under the Ohio Axle-Mile Tax Law.* In the light of the foregoing, the two questions presented are:

I. Whether the Act, on its face and as applied to such interstate motor carriers, violates the Commerce Clause and the Equal Protection and Due Process Clauses of the Fourteenth Amendment of the Federal Constitution, because it is unreasonable and discriminatory, imposes an intolerable financial burden upon such carriers, unduly burdens and restricts the free flow of interstate commerce, and imposes taxes far in excess of and having no reasonable relation to fair compensation to Ohio for use by such carriers of such highways in said State.

II. Whether the Act as applied and construed in this case, with respect to assessments covering Michigan- and

Indiana- registered vehicles, is rendered void and in violation of the Fourteenth Amendment and the Commerce Clause of the Federal Constitution, because such "no-reciprocity" policy in the face of Sec. 5728.15, is wholly arbitrary, non-discretionary and inflexible, is not subject to the control of and is in conflict with the objectives of the Ohio Legislature, and deprives Appellant and other similarly situated motor carriers of property without notice and hearing and without due process of law, and unduly burdens interstate commerce.

ARGUMENT

I.

THE QUESTION AS TO CONSTITUTIONAL INVALIDITY OF THE OHIO AXLE-MILE TAX LAW AS APPLIED TO EXCLUSIVELY INTERSTATE MOTOR CARRIERS IS SUBSTANTIAL

While at the very outset of the Motion to Dismiss Appellee states that "highway use taxes have been considered by this Court on many occasions" (Motion, p. 2), the fact is that this Court has *never* passed upon a state highway mileage tax law with variations in the tax rate based solely on the number of axles, *without regard to weight or load.* Most certainly, it has never had before it a "third structure" highway tax statute involving anywhere near the excessively large amounts of tax upon exclusively interstate motor carriers, as those involved in this appeal. See *Capitol Greyhound Lines v. Brice,* 339 U. S. 542, 561 (1950), Appendix to opinion of Frankfurter, J., detailing all such cases which have previously come before this Court.

Never before has this Court been faced with a state highway tax which, because of its nature and amounts involved and the arbitrary manner of its administration with respect to interstate carriers, has engendered such serious controversy among states and such retaliation by other states, actual and potential, as now exists in connection with the Ohio Axle-Mile Tax Law (See J. S. 14-15; *infra* pp. 14, 21).

In no previous case before this Court has a motor carrier engaged exclusively in interstate commerce presented in the courts below a complete and devastating factual record, showing that a state highway tax is arbitrary, discriminatory and wholly unrelated to fair compensation to the State for its share of the roads used by such carrier, and so excessive as to preclude continued profitable operation of such interstate carrier, only to be told by the highest court of the State that such evidence "would have better been directed to the General Assembly (See Opinion Below, 143 N. E. (2d), at p. 836; J. S. Appendix A, 2a).

In arguing that the tax is non-discriminatory, the Motion merely states that the same formula applies to vehicles used in interstate as in intrastate commerce (Motion, pp. 3-4). But in the record in this case there is voluminous *and uncontroverted* evidence (Ex. 2, Tr. 18-19; Ex. 5, Tr. 195, 268; Ex. 5 (a), Tr. 267) showing that because the Act imposes a tax varying arbitrarily with the type of vehicle and the number of axles in excess of two, wholly without regard to weight *or to whether the vehicle be empty or loaded*, and because the tax is not imposed upon all axles, the Ohio Axle-Mile Tax Law has "built-in" discrimination, reflected in arbitrary variations in its incidence, to Appellant's substantial prejudice. The record shows variations in tax rate per axle of from 1/6¢ per mile to ½¢ per mile,

and in annual tax per axle of from $150 to $450 for vehicles carrying the same weight (Ex. 5, Table VI, Tr. 195), the higher rates being applicable to the types of vehicles used by Alger in interstate commerce.

The Motion makes patently unsound attempts to argue that the tax is not excessive under *Capitol Greyhound Lines v. Brice*, 339 U. S. 542 (1950) and other decisions involving state highway taxes on interstate commerce.

The assertion (Motion, p. 4) that the Ohio State Legislature, in adopting the Ohio Axle-Mile Tax Law, made studies of highway construction and wear and considered in this connection loadometer reports in evidence below (Exs. A-E, Tr. 372) is not supported by any evidence. In fact, Appellee's own witness testified that these Exhibits were prepared only for use by the Bureau of Public Roads and Department of Highways, and not for any legislative committee (Tr. 342). The statement in the Motion as to the Ohio General Assembly's "consideration of economic factors" (Motion, p. 4) impels us to direct to this Court's attention the findings made by a Federal District Court in *Noerr Motor Freight, Inc. v. Eastern Railroad Presidents Conference*, 155 F. Supp. 768 (E. D. Pa. 1957) that "slanted statistics" were furnished to representatives of the Ohio Legislature in connection with the Ohio Axle-Mile Tax Law by the then Director of the Ohio Department of Highways (See 155 F. Supp. at 784-86).

Reliance by the Appellee upon the determination imputed to the Ohio Legislature and the opinion of the Supreme Court of Ohio below as establishing the non-excessiveness of the axle-mile tax beyond review by this Court (Motion, p. 4) is also legally unsound. It is well established that "this Court, and not the State Legislature, is under the Commerce Clause, the final arbiter of the competing de-

mands of state and national interest," *Southern Pacific Railway Co. v. State of Arizona*, 325 U. S. 761, 769 (1945).

The attempted belittlement of the amounts of tax involved under the Ohio Axle-Mile Tax Law by reference to figures of $5.4 million and $5.3 million as the amounts of tax collected for parts of fiscal years 1954 and 1955 (Motion, p. 4), does not even begin to apprise this Court of the tremendous total amounts of tax actually involved under the Ohio Axle-Mile Tax Law. Adjustments of the figures cited by Appellee in the Motion to reflect full years (3 x 5.3 million = 15.9 million) and to reflect the large amounts of unpaid levies upon interstate carriers like Alger which are pending awaiting the outcome of this appeal (average at least 3.7 million per year based on official figures furnished by Ohio Department of Taxation), shows that the Ohio Axle-Mile Tax Law, if it is applied as Appellee proposes herein, would involve taxes totaling approximately $20,000,000 per year.

Appellee contends that there is no constitutional limitation "on the amount which the state may raise and spend for highway purposes" (Motion, p. 5). But the decision of this Court in the *Brice* case, *supra*, establishes the constitutional principle that where interstate motor carriers demonstrate that the total amount which a state is raising by way of highway taxes is out of line, this will render such taxes invalid on the ground that "the amount of the tax exceeded fair compensation to the State" (see 339 U. S. at 544). As the majority decision in the *Brice* case states:

> "Our adherence to existing rules does not mean that any group of carriers is remediless if the total Maryland taxes are out of line with fair compensation due to Maryland. Under the rules we have previously prescribed, such carriers may challenge the

> taxes as applied, and upon proper proof obtain a judicial declaration of their invalidity as applied." (339 U. S. at 547.)

The record below contains such proof in the form of uncontroverted evidence showing that total highway taxes, including the axle-mile tax, exacted by Ohio during 1954, exceeds by more than $23,000,000 the revenues needed to finance the Ohio State Highway Program as announced by the State (Ex. 5, Table VII, Tr. 182-195). The Supreme Court of Ohio apparently paid no attention to this evidence, since it made no comment upon it. Only through this appeal will Appellant be enabled to have its day in court on this issue, so clearly material to constitutionality.

The Motion states (Motion, p. 5) that "the financial strain upon Appellant's business is likewise immaterial".* *But this Court has expressly ruled to the contrary.* The principle of the majority decision of this Court in the *Brice* case, *supra*, as noted by Mr. Justice Frankfurter in his dissent, is that the validity of a state highway tax as applied to interstate commerce is, among other things, to be tested "by the size of the financial burden which such a tax entails" (339 U. S. at 554, see also at 555).

The record below contains specific evidence, in no way controverted, showing that application of the axle-mile tax to Alger's operations for the year 1953 would result in a total axle-mile tax of $204,559 for such year and would turn its profit before taxes of $157,792 into a loss of $3,009 (Ex. 10, Tr. 59-71), without allowing for administration cost of about 8¢ per dollar of such tax assessed (Tr. 41); that if such tax were in existence in each of the five states served by Alger, the tax would amount to $511,375,

---

*The only case cited in the Motion for this proposition is a district court decision which contains no express discussion of the point.

resulting in a loss of $309,825 (Id.); that total annual Ohio highway taxes applied to Alger's vehicles would be up to $4,262 per vehicle; and that the annual Ohio axle-mile tax alone would amount to as much as $2,250 per vehicle (Ex. 5, Tables II-A, III-A, Tr. 195, 123-133).

These amounts far exceed any direct highway tax on interstate motor carrier operations heretofore considered by this Court. The total annual axle-mile tax on Alger of $204,559 is 34 times the total involved in *Dixie-Ohio Express Company v. Commissioner,* 306 U. S. 72 (1939), and the maximum axle-mile tax per vehicle of $2,250 is 4½ times that involved in the *Brice* case, *supra.*

These tremendous amounts of tax are presented on this appeal against the background of a new and important development in Congressional legislation which has taken place since the previous decisions of this Court dealing with "third structure" highway taxes as applied to interstate motor carriers. Under the Federal Highway Aid Act of 1956 (23 U. S. C., Sec. 25(a), 62, 151 *et seq.*) the federal government has now assumed 90% of the cost, so that Ohio only pays 10% of the cost, of the Federal-Aid Highways upon which practically all of Alger's operations are performed (Tr. 40, 346). Indeed Ohio pays none of the costs with respect to urban system highways and streets in Ohio upon which Alger operates (Tr. 362) and as to which Ohio claims a right to "compensation."

It cannot be seriously contended, as the Motion purports to do (Motion, p. 5), that this constitutional question, related on the appeal to a framework of Congressional legislation not enacted until 1956, is foreclosed by a one-sentence footnote in the decision of this Court 11 years ago in *Aero Mayflower Transit Co. v. Board of Railroad Commissioners,* 332 U. S. 495, fn. 16, 503 (1947),

in the completely different context of that earlier case. The *Aero Mayflower* case involved a flat tax (not a mileage tax) of $25 per vehicle as against $2,250 in this case (Ex. 5, Table II-A, Tr. 195, 123-133); did not involve, as here, practically 100% use of Federal-Aid Highways (Tr. 40, 364); and any federal aid to highways at the time of that case was far short of the 90% of cost now and here involved.

The *Aero Mayflower* approach is completely inapplicable under present-day conditions, and particularly to the facts involved in this appeal. Here, this Court must be mindful that in the landmark case of *Hendrick v. Maryland*, 235 U. S. 610 (1915), the basis for state compensatory highway taxation upon interstate commerce was said to be that:

> "Where a state *at its own expense* furnishes *special facilities* for the use of those engaged in commerce, interstate as well as domestic, it may exact compensation *therefor*." (235 U. S. at 623.) (Emphasis ours.)

The statement in the Motion that "The highways of Ohio are built, owned and maintained by the State of Ohio" (Motion, p. 5) is basically irrelevant to the issue on this appeal, since the Federal-Aid Highways, which are substantially the only ones used in Ohio by Alger, and other similarly situated interstate carriers (Tr. 40, 364), are *not* built and maintained by Ohio solely "at its expense".

This Court has in the past frequently adverted to the factor of increasing federal aid to highways located within the states in determining the reasonableness of state action affecting interstate commerce on the highways. See e.g. *Buck v. Kuykendall*, 267 U. S. 307, 314, 316 (1925). It should most certainly evaluate the constitutionality of

the Ohio Axle-Mile Tax Law, as now applied to Alger, in the light of the actual facts *as they exist today* in relation to the expense incurred by Ohio with respect to the specific interstate facilities used by Alger, for which Ohio may constitutionally exact only "fair compensation". Cf. *Nashville, Chattanooga & St. Louis Railway v. Walters*, 294 U. S. 405, 417 (1935).

The Motion cites court decisions upholding highway use taxes "based upon *weight* and distance", and goes on, quite disingenuously, to state that "the selection, by the Ohio General Assembly, of axles in substitution for weight would seem to be within the broad latitude authorized the states in devising a formula for exacting compensation for highway use" (Motion, pp. 5-6).

But this completely disregards the factual situation presented in the record below (J. S. 13-18). The record contains Exhibits (Ex. 2, Tr. 18-19), carefully prepared and fully presented engineering studies (Exs. 5, Tr. 195, 268; Ex. 5(a), Tr. 267), and oral testimony by acknowledged experts (Tr. 107-207, 211-244, 90-105, 246-264), all demonstrating forcefully that the "formula" (if it can be designated such) embodied in the Ohio Axle-Mile Tax Law results in unfair and discriminatory variations in tax incidence, completely without regard to the weight of vehicles or to whether vehicles are loaded or unloaded, and without regard to wear thereof upon the roads, so that the amounts of tax involved are excessive and wholly unrelated to "fair compensation" to the State of Ohio.

On such a record, it is patently unsound for Appellee to argue that decisions upholding highway taxes based on a combination of *weight* and distance have any bearing on the validity of the wholly arbitrary Ohio Axle-Mile "formula" proven by facts of record below to have no relationship at

all to road use or wear. Such uncontradicted evidence of record effectively negates the statement in the Motion (at p. 6) that there is "a reasonable relationship between the Ohio formula of highway use taxation and highway use." The evidence goes far beyond the limited purpose attempted to be attributed to it in the Motion (at p. 4) of merely challenging the 2-axle exemption.

The Motion makes the surprising statement that "Exhibit 2 shows that the graduations of the Ohio highway use tax are proportionate to actual load limits" (Motion, p. 6). Actually, Exhibit 2 (Tr. 19), together with other evidence of record (Ex. 5, Tr. 195, 268; Ex. 5(a), Tr. 267; Tr. 107-8, 221-3), makes it clear that the Ohio Axle-Mile Tax Law is entirely outside the principle of "rough approximation" stated in the *Brice* case.

In short, the Ohio "formula" is shown by the record herein to be so completely devoid of *any* "approximation" whatever to fair compensation to Ohio for Alger's interstate use of Federal-Aid Highways in that State, and to result in taxes so excessive upon Alger and other interstate motor carriers, that it gives rise to most substantial questions of constitutional invalidity under the Commerce, Due Process and Equal Protection Clauses, meriting a full review by this Court.

II.

THE QUESTION AS TO CONSTITUTIONAL INVALIDITY OF THE OHIO AXLE-MILE TAX LAW WITH RESPECT TO ASSESSMENTS THEREUNDER LEVIED PURSUANT TO THE ARBITRARY AND INFLEXIBLE "NO-RECIPROCITY" POLICY APPLIED BY APPELLEE AND OTHER OHIO OFFICIALS IS SUBSTANTIAL

In enacting the Ohio Axle-Mile Tax Law, the Legislature of the State of Ohio itself inserted in the Act a reciprocity Section, Rev. Code of Ohio, Sec. 5728.15, by which Appellee and two other officials of the State

> "* * * are hereby authorized and empowered to enter into such reciprocal contracts and agreements with the proper authorities of any state * * * which levies a highway use tax in addition to motor vehicle registration fees exempting from the provisions of Sections 1 through 14 of this act the owner of every motor vehicle which is duly registered in any such state * * *"

with the proviso that owners and operators of Ohio-registered vehicle be reciprocally exempted from the motor vehicle tax and registration laws of such other state.

In the face of the above section inserted in the Act by the Ohio Legislature, Appellee and the other designated State officials, in their administration of the Ohio Axle-Mile Tax Law, have taken it upon themselves completely and irrevocably to deprive Alger and other similarly situated interstate motor carriers of the opportunity for reciprocal exemption which the Legislature specifically provided.

This has occurred through the admitted adoption by Appellee and the other Ohio officials, and Appellee's application, in levying the assessment under the Ohio Axle-Mile

Tax Law involved in this appeal, of a fixed and inflexible "no-reciprocity" policy. Such policy is established of record below by their sending of uniform notices to every State with which Ohio had a reciprocal exemption agreement, canceling such agreements (R. 9; 59-62); their failure and refusal to enter into a single reciprocal exemption agreement with any State as provided in Section 5728.15 (see Tr. 303; R. 59-60); their arbitrary refusal, without stated reason, to sign on behalf of the State of Ohio a reciprocal exemption agreement signed and tendered to them by the proper officials of the State of Michigan, in accordance with the provisions of said Section 5728.15 (R. 12-16; 66-75), despite a statement by the Michigan officials that concurrence in the Ohio position would deny "Michigan citizens their inherent statutory rights by whim or caprice" (R. 63); and their insistence upon express exclusion of the Ohio Axle-Mile Tax Law from any and all reciprocal exemption agreements.

The existence of this unusual, indeed extraordinary, "no-reciprocity" policy with respect to the Ohio Axle-Mile Tax Law has been expressly noted by Congress in H. Res. 407, 83rd Cong., 2nd Sess., providing for an investigation "with particular reference to the discriminatory and unilateral refusal of the State of Ohio to grant such reciprocal exemption from its axle-mile tax." (Staff Report to the Committee on Interstate and Foreign Commerce "State Taxation of Interstate Trucking and the Reciprocity Problem," 84th Cong., 2nd Sess., House Document No. 449, July 16, 1956, p. 63.)

The second constitutional question on this appeal challenges the validity of the Ohio Axle-Mile Tax Law in its specific application and administration by Appellee and the other Ohio officials pursuant to their own arbitrary, inflexible and non-discretionary "no-reciprocity" policy as

shown in the record below. This issue is entirely unique, arising out of a situation which has never before existed in the history of state highway taxation of interstate motor carriers, and one with which this Court has most certainly never previously been confronted.

The Motion to Dismiss does not cite a single decision of this or any other Court bearing on this constitutional issue. The Motion only cites *Kane v. New Jersey*, 242 U. S. 160 (1916), for the proposition that "reciprocity is not an essential of a valid highway use taxation" (Motion, p. 6). That case, arising in 1916 and involving a state registration tax with a maximum of $10, merely holds that in the light of conditions applicable in the year 1916 and the nature and amount of the particular highway tax there involved, an automatic grant of reciprocity *by the State Legislature* was not constitutionally requisite.

However, we are not questioning the constitutional power of the Ohio State Legislature to deny reciprocity. The Legislature did make provision therefor in Section 5728.15. What we challenge here is the arbitrary adoption and application of a fixed and inflexible "no-reciprocity" policy by Appellee and other Ohio officials (who are most certainly *not* the Ohio Legislature) in the administration of the Ohio Axle-Mile Tax Law. We contend that this specific application renders the Law invalid because it involves a denial of the fundamentals of Due Process to Alger and others similarly situated with respect to Michigan- and Indiana-registered vehicles which would be exempted under a valid application of the Law, and also unduly burdens and restricts interstate commerce.

In the opinion below, the Supreme Court of Ohio ruled merely that Section 5728.15 is not mandatory. The Court's actual interpretation of the Section is ambiguous, since it merely stated that

> "* * * it was clearly not the intent of the General Assembly to have an automatic reciprocity with the other states in relation to the axle mile tax but instead left it to the discretion of and for the determination of the board." (J. S. Appendix A, 8a.)

Having sanctioned (at least by silence) the "no-reciprocity" policy in its opinion below, the Supreme Court of Ohio, in *State ex rel Motor Freight System v. O'Neill*, 167 Ohio State 139, 146 N. E. (2d) 720 (December 18, 1957) has subsequently held that mandamus would not lie to review this inflexible and non-discretionary policy.

The primary constitutional question presented by the foregoing is one of due process under the Fourteenth Amendment.

If the quoted portion of the decision of the Supreme Court of Ohio appealed from is construed as meaning that the Ohio Legislature in enacting the Ohio Axle-Mile Tax Law conferred upon Appellee and the other state officials named its plenary legislative power over reciprocity, with the wholly unrestricted power to formulate any policy at all—including the "no-reciprocity" policy actually being applied—then it seems clear that the Act violates the due process prohibition recently announced in the prevailing opinion of this Court in *Sweezey v. New Hampshire*, 354 U. S. 234, 255 (1957), against separation of legislative power from responsibility to direct its use. See also *Raley v. Ohio*, 354 U. S. 929 (1957); *Uphaus v. Wyman*, 355 U. S. 16 (1957).

On the other hand, if a more limited interpretation be placed upon the Act, namely, that the State Legislature conferred upon Appellee and the other State officials only the limited discretion to determine on a case by case

basis, whether a particular state qualified for a reciprocity agreement as one "which levies a highway use tax in addition to motor vehicle regislation fees", then the adoption by Appellee and the other officials concerned of the fixed, inflexible and non-discretionary "no-reciprocity" policy as to the axle-mile tax represents an arbitrary and perverted exercise of power, nullifying such limited intent of the State Legislature. It constitutes an abuse of power precisely like that of the Board of Supervisors in *Yick Wo v. Hopkins,* 118 U. S. 356 (1886) which, under a laundry-licensing ordinance valid on its face, refused to license any Chinese whatever, thereby causing this Court to strike down the ordinance, as thus arbitrarily administered, as in violation of the Fourteenth Amendment.

Moreover, imposition of the extremely burdensome and financially prohibitive axle-mile tax on the basis of such "no-reciprocity" policy operates to deprive Alger and others similarly situated of property in violation of the most fundamental of due process requirements, namely, notice and hearing. The Motion in this connection merely states, without any citation of authority, that "nothing in the nature of the problem requires that the Ohio Reciprocity Board confer with Appellant or give Appellant an opportunity to be heard, before deciding whether a particular reciprocity agreement would be in the best interest of the State of Ohio" (Motion, p. 7).

If this statement is intended to mean that the making of a reciprocity agreement does not require notice and hearing because it does not directly command action by, or otherwise directly affect Alger, then it flies in the face of many due process decisions of this Court. As the Court said in *Anti-Fascist Committee v. McGrath,* 341 U. S. 123 (1950)—

> "We long have granted relief to parties whose legal rights have been violated by unlawful public action **although such action made no direct demands upon them.** *Columbia Broadcasting System v. United States*, 316 U. S. 407; *Pierce v. Society of Sisters*, 268 U. S. 510; *Buchanan v. Warley*, 245 U. S. 60; *Truax v. Raich*, 239 U. S. 33." (341 U. S. at 141.) (Emphasis ours.)

The above statement in the Motion may be meant to imply that notice and hearing is not required because the "no reciprocity" policy involves a purely "legislative" rather than a quasi-judicial, determination that Ohio will collect more revenue under such policy. If so, we point out that even if Appellee and the other Ohio officials need not have granted notice and hearing with respect to their "legislative function" in *adopting* the "no-reciprocity" policy itself, it certainly cannot be contended that the specific *application* of the policy to one directly affected thereby can validly be effected without notice and hearing. Since Alger was directly affected by the refusal of the Ohio officials to sign the proffered reciprocal exemption agreement actually tendered by Michigan (R. 12-16; 66-75), the Ohio officials were required by the Fourteenth Amendment to afford Alger an opportunity to be heard, at least with respect to whether such particular application of the "legislative" policy would be to the ultimate best interests of the State of Ohio, even at the expense of destroying interstate commerce. Cf. *Southern Railway Co. v. Virginia*, 290 U. S. 190 (1933).

This Court, throughout its history, has narrowly limited those types of situations regarded as so entirely "legislative" as to obviate the need for notice and hearing to parties adversely affected. As stated by Mr. Justice Frankfurter in his concurring opinion in *Anti-Fascist Committee v. McGrath, supra:*

> "The high social and moral values inherent in the procedural safeguard of a fair hearing are attested by the narrowness and rarity of the instances when we have sustained executive action even though it did not observe the customary standards of procedural fairness." (341 U. S., at 167.)

And while this Court has ruled that notice and hearing may not be constitutionally requisite on the question of whether property is needed for a public use, *Rindge Co. v. Los Angeles,* 262 U. S. 700 (1923), it has nevertheless held that in decisions involving local taxation for improvements, owners must be given a hearing on valuation as well as on the question of whether their property has been benefited, whenever that determination has not been legislatively made. See, e. g., *Embree v. Kansas City Road District,* 240 U. S. 242 (1916); cf. *Anniston Mfg. Co. v. Davis,* 301 U. S. 337 (1937). This Court has also ruled that even where an individual's interest is created *ex parte,* it may not be destroyed "without that character of notice and opportunity to be heard essential to due process of law," *United States ex rel. Turner v. Fisher,* 222 U. S. 204, 208 (1911); *Garfield v. United States,* 211 U. S. 249 (1908). As appears in a concurring opinion in *Anti-Fascist Committee v. McGrath, supra,*

> "Even if the distribution by the Government of benefits that may be withheld, the opportunity of a hearing is deemed important." (341 U. S. at 166.)

The Motion takes the position that Michigan does not levy a highway use tax, and that "the so-called Michigan highway use tax is in reality a public utility fee • • •" (Motion, p. 7). But the Supreme Court of Ohio has expressly ruled to the contrary. In the earlier related case involved in this appeal, namely *Interstate Motor Freight System v. Bowers* and *Geo. F. Alger Co. v. Bowers,* 164

Ohio State 122, 128 N. E. (2d) 97 (July 27, 1955), that Court described the Michigan tax in question as "a 'third structure' tax, to wit, mileage fees" (J. S. Appendix A, 16a), and referred to it as "a mileage tax from which Ohio carriers are by the agreement exempted" (J. S. Appendix A, 22a). It is futile for Appellee, in an effort to belittle the substantial constitutional issue here involved, now to attempt to characterize as merely "a public utility fee" the Michigan tax which the highest court of the State of Ohio has ruled to constitute a "third structure" highway use tax comparable to the Ohio highway axle-mile tax.*

While, as above noted, our major contention with respect to the second constitutional question lies in the Due Process requirements of the Fourteenth Amendment, the "no-reciprocity" policy also raises a substantial Commerce Clause question. The Ohio Legislature in enacting Ohio Rev. Code, Sec. 5728.15, with its express authority for reciprocal agreements, manifestly intended thereby to eliminate the burden of the Ohio Axle-Mile Tax Law upon interstate commerce. Adoption of the "no-reciprocity" policy, defeating this legislative purpose, presents a serious question, of national importance, as to whether the Ohio Axle-Mile Tax Law, in view of the excessively large amounts of tax involved, constitutes an unreasonable burden upon interstate commerce through inevitable substantial multiple taxation upon interstate carriers. This point is discussed in the dissenting opinion in the *Brice* case, *supra*, as follows:

> "When a privilege tax is relatively small in amount, and therefore to be treated as a rough

---

*The Michigan tax in question is listed among "third structure" highway use taxes comparable to the Ohio Axle-Mile Tax in the Staff Report to the Committee on Interstate and Foreign Commerce, "State Taxation of Interstate Trucking and the Reciprocity Problem", House Document No. 449, 84th Cong. 2nd Sess., July 16, 1956, at pp. 12-15.

> equivalent for what the State may exact with due regard to administrative practicalities, the danger of an unfair burden falling upon interstate commerce remains correspondingly small. Cf. *Union Brokerage Co. v. Jensen*, 322 U. S. 202, 210-11. But a large privilege tax presents dangers not unlike those arising from unapportioned gross receipts taxes on interstate transportation beyond a State's power to impose. Cf. *Central Greyhound Lines, Inc. v. Mealey*, 334 U. S. 653." (339 U. S. at 558.)

Commentators have noted that the "no-reciprocity" policy under the Ohio Axle-Mile Tax Law has stirred up a storm of controversy between Ohio and other states. See *Note, The Ohio Axle-Mile Tax,* 23 U. of Cinn. Law Rev. 442, 446-447 (1954), referring to *Double Trouble on Truck Tax,* Business Week, June 28, 1954, p. 28. The arbitrary position taken by Ohio has already resulted in retaliatory taxation of interstate motor carrier commerce by more than 17 states (See Staff Report on Committee on Interstate and Foreign Commerce, House Document No. 449, 84th Cong., 2nd Sess., July 16, 1956, p. 3), with application of certain of these retaliatory levies being withheld pending the outcome of this appeal. This constitutes the greatest threat to the flow of interstate motor carrier commerce which the nation has ever faced, and in itself raises a substantial constitutional question, meriting full review.

CONCLUSION

The constitutional questions presented are novel and most substantial, meriting plenary consideration, with briefs on the merits and oral argument before this Court. The Motion to Dismiss this appeal should be denied and probable jurisdiction noted.

Respectfully submitted,

EDMUND M. BRADY,
JOHN M. VEALE,
2150 Guardian Building,
Detroit 26, Michigan.
TAYLOR C. BURNESON,
3510 LeVeque-Lincoln Tower,
Columbus 15, Ohio.
PAUL D. MILLER,
MILTON BLACK,
20 Broad Street,
New York 5, New York.

Of Counsel:
MATHESON, DIXON & BRADY,
2150 Guardian Building,
Detroit 26, Michigan.
MUDGE, STERN, BALDWIN & TODD,
20 Broad Street,
New York 5, New York.

Dated: July 2, 1958.